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No. ____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

REUBEN STURMAN, JOSEPH ZERNIC,

*Petitioners,*

—vs—

UNITED STATES OF AMERICA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BERNARD A. BERKMAN
GEORGE W. PALDA
BERKMAN, GORDON, MURRAY and PALDA
2121 Illuminating Building
55 Public Square
Cleveland, Ohio 44113
(216) 781-5245

*Attorneys for Petitioner*

*Of Counsel:*

LORRAINE R. BAUMGARDNER

## QUESTION PRESENTED FOR REVIEW

Whether, pursuant to the teaching of Abney v. United States, 431 U.S. 651 (1971), an evidentiary hearing must be held upon a defendant's motion to dismiss an indictment on grounds of double jeopardy?

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IN THE
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October Term, 1982

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REUBEN STURMAN,
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On Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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Reuben Sturman and Joseph Zernic, petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit appears at 679 F. 2d 840, and is set forth in the

separately bound Appendix at A3 - A21. The unreported opinion of the United States District Court for the Southern District of Florida is set forth in the Appendix at A22-A26.

## JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Eleventh Circuit were filed on June 28, 1982. The Court of Appeals denied the petitioners' application for rehearing on August 27, 1982. This petition seeks review of the judgment of a United States Court of Appeals in a criminal case. This Court has jurisdiction to grant this petition under 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States is set forth in the Appendix at A191. Title 18, Sections 2, 371, 1461, 1462 and 1465 are set forth in the Appendix at A192-A201.

## STATEMENT OF THE CASE

This petition seeks review of the judgment entered by the United States Court of Appeals for the Eleventh Circuit which affirmed the order of the United States District Court for the Southern District of Florida denying petitioners an evidentiary hearing on a motion for dismissal of a conspiracy count in an indictment because of double jeopardy.

On February 11, 1980, an indictment was returned against petitioners, along with forty-three other named defendants, charging them with participation in a nationwide conspiracy to transport obscene materials in interstate commerce. In response to this indictment, petitioner Reuben Sturman, joined by petitioner Joseph Zernic, filed a motion to dismiss the conspiracy charge, on the ground that the previous acquittal on a charge of conspiracy to violate 18 U.S.C. §§1461, 1462 and 1465 under an indictment filed and tried in the Northern District of Ohio, Eastern Division

(Case No. CR76-124, App. at A153-A190) required dismissal pursuant to the Fifth Amendment protections against double jeopardy. In conjunction with their motions, petitioners requested an evidentiary hearing. Subsequently, on October 16, 1980, a grand jury in the Southern District of Florida issued sixteen indictments superseding the original indictment that petitioners had challenged. The superseding indictments separated the forty-five defendants into sixteen groups based upon geographic location and added charges under 18 U.S.C. §1462 to the conspiracy count, together with three parallel substantive counts. Moreover, in the superseding indictment filed against petitioners, the government changed the date on which the conspiracy allegedly commenced from July 1, 1977 charged in the original indictment, to December 1, 1977.

A comparison of the Florida prosecution with the prior prosecutions for alleged

conspiracies in Pennsylvania and Ohio reveals that all three were in reality parts of a single conspiracy. The Ohio conspiracy charge encompassed the time period beginning in September of 1973 and continuing until March 15, 1976 (App. at A153). The Pennsylvania conspiracy, which a Pennsylvania district court found to be part and parcel of the Ohio conspiracy, allegedly was conducted from January 1, 1974 through July 18, 1977 (App. at A123). Significantly, the original Florida indictment set forth the dates of that "nationwide" conspiracy as being from July 1, 1977 through February 11, 1980 (App. at A42), thus overlapping with the time period charged in the Pennsylvania indictment. It was only after petitioners challenged the indictment on double jeopardy grounds that the government issued a superseding indictment which removed the overlapping dates and

substituted a date creating a six-month hiatus (App. at A27).

Similarly, the conspirators alleged in Ohio and in Florida overlapped substantially in identity. Three of the four indicted Florida conspirators were charged or identified as conspirators in Ohio. Petitioners Sturman and Zernic were charged as conspirators in Ohio. Al Bloom, a defendant in the Florida prosecution, was identified as an unindicted conspirator in the Cleveland trial. Although Sovereign News, a defendant in the Ohio prosecution, was not named in the Florida indictment, the superseding indictment referred to an unnamed business as the vehicle by which the conspiracy was conducted (App. at A30, A125, A156).[1/]

Moreover, the statutory offenses were virtually identical, as was the nature

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1/ Numerous search warrant affidavits and discovery documents identify this unnamed corporation as Sovereign News.

and scope of the conspiracy. At trial in the Ohio prosecution, the government attempted to prove a nationwide conspiracy, see, United States v. Kamins, 479 F. Supp. 1374, 1386-1388 (W.D. Pa. 1979), while the original Florida indictment also charged the petitioners as participants in a nationwide conspiracy (App. at A44). Further comparison of the respective alleged conspiracies shows that each referred to the same supervisory personnel (App. at A30, A125), the same day-to-day participants (App. at A30, A156), and the same point of origin for the overt acts (App. at A31-A33, A156-A160).

After issuance of the superseding indictments, petitioners renewed their challenge to the indictment on double jeopardy grounds. In their motions, they clearly set forth the overlap in the

Florida and Ohio indictments. The documents attached to petitioners' motions, which included the Ohio indictment and subsequent acquittal, the Pennsylvania indictment and the opinion dismissing that indictment (United States v. Kamins, 479 F. Supp. 1374 (W.D. Pa. 1979), demonstrated that the charges, method, operation and scope of the conspiracies were identical and that their time periods overlapped.[2/] Petitioners subsequently filed a complete transcript of the trial on the Ohio indictment to substantiate directly the uncontested findings of the

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2/ Because the government, by artful drafting, can carve separate conspiracies from a single conspiracy, the courts have applied a different standard in determining the validity of double jeopardy claims involving conspiracies than used in analyzing substantive offenses. Rather than use the "same evidence" test, courts have focused their inquiry on whether the totality of circumstances demonstrates that the two alleged conspiracies are, in reality, part of a single conspiracy. See, United States v. Mallah, 503 F. 2d 971 (2nd Cir. 1974), cert. denied, 420 U.S. 995 (1975); United States v. Tercero, 582 F. 2d 312 (8th Cir. 1978).

district court in Kamins and the assertions made in petitioners' motions.

Petitioners incorporated as part of their motion the decision in United States v. Kamins, 479 F. Supp. 1374 (W.D. Pa. 1979). In Kamins, the Pennsylvania district court thoroughly analyzed and compared the Ohio and Pennsylvania conspiracies charged by the government. The court ultimately determined that the alleged Ohio conspiracy subsumed the conspiracy charged in the subsequent indictment returned in Pennsylvania.[3/] Specifically, it found: "[I]t appears the government brought the entire beast into court during the first trial [in Ohio] and now attempts to dismember it." Id., at 1390. Petitioners presented the

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3/ The United States did not appeal from this judgment and therefore is now collaterally estopped from challenging the district court's findings. Ashe v. Swenson, 397 U.S. 436 (1970). Rather, the determination that the Ohio indictment conspiracy subsumed the Pennsylvania conspiracy must be accepted as established fact.

Pennsylvania district court's finding that the Ohio conspiracy subsumed the conspiracy charged in the Pennsylvania indictment, one which possessed overlapping dates with that of the Florida conspiracy, as substantiation for their argument that the conspiracy charged in the Florida indictment was also a part of the nationwide conspiracy charged in the prior Ohio indictment.[4/] Following the

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[4/] The court below failed to recognize the significance of petitioners' argument that because the unappealed decision of the Pennsylvania court found that the Ohio conspiracy subsumed the Pennsylvania conspiracy, the dates and details of that conspiracy became relevant in evaluating petitioners' double jeopardy claim in the Florida prosecution. Instead, the courts below misinterpreted petitioners' argument as relying on the Pennsylvania prosecution as one in which jeopardy attached. As evidence of its confusion, the Court of Appeals commented: "Appellants seek to paper over the twenty month gap by injecting the dismissed Pennsylvania indictment and the original Florida indictment into our examination. This argument cannot succeed, however, for the simple reason that appellants were not placed in jeopardy under the dismissed Pennsylvania indictment." Id., at 844; App. at A14-A15.

reasoning of the Pennsylvania court, petitioners asserted that the government was simply attempting to circumvent petitioners' Fifth Amendment protections by cosmetically manipulating the allegations of the indictment.

Despite the importance of the issue raised by petitioners in their motion to dismiss, See, Abney v. United States, 431 U.S. 651 (1971), the Florida district court denied petitioners' request for an evidentiary hearing. Concluding, without an evidentiary hearing, that the motions were based on frivolous grounds, the court also denied the motions to dismiss. Notices of appeal from this order were timely filed with the district court.

The issues presented to the Court of Appeals were twofold: First, petitioners argued that the district court erred in failing to hold an evidentiary hearing on the double jeopardy issues raised by

petitioners, and secondly, they argued that on the record presented, the petitioners proved their claims of double jeopardy.

Over the strong dissent of Judge Hatchett, the Court of Appeals affirmed the order of the district court. With respect to petitioners' claim that the district court erred in failing to hold an evidentiary hearing, the court stated:

> Absent a proffer of evidence demonstrating a non-frivolous double jeopardy claim there is no obligation to hold an evidentiary hearing pursuant to Stricklin [591 F. 2d 1112 (5th Cir. 1979)]. In this case, appellants have failed to tender the requisite prima facie claim and the district court properly ruled on the motion on the basis of the extensive papers before it.

Id., at 844; App. at A18. The court upheld the district court's ruling on the double jeopardy motion despite the absence of any evidentiary hearing, contrary to the rule established in United States v. Stricklin, 591 F. 2d 1112, 1117 (5th Cir.) cert. denied, 444 U.S. 963, 100 S.Ct. 449,

62 L.Ed. 2d 375 (1979),[5] even though Stricklin ostensibly was regarded by the majority as precedent in the Eleventh Circuit.

In dissent, Judge Hatchett explained the gravity of the majority's error. He noted:

> The district court in the instant case erred in neglecting to conduct a pretrial evidentiary proceeding in which a record could have been made to test the double jeopardy claim. Since a question exists of factual manipulation by the government in defining the conspiracy charge, the failure to conduct the hearing is critical.

Id., at 485; App. at A20 (Emphasis added). On that basis, Judge Hatchett stated that he would "reverse and remand with instructions to conduct the requisite evidentiary hearing, which also would clarify [the factual] questions." Id., App. at A21.

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[5] The Stricklin court adopted the rule announced by the Third Circuit in United States v. Inmon, 568 F. 2d 320 (3rd Cir. 1977).

Because of the important questions raised by the court below regarding the proper procedure for evaluating a double jeopardy challenge, petitioners now seek review by this Court of the decision rendered by the Court of Appeals for the Eleventh Circuit.

## REASONS FOR GRANTING THE WRIT

### AN IMPORTANT QUESTION IS PRESENTED, UPON WHICH THERE IS CONFLICT AMONG FEDERAL COURTS OF APPEAL, CONCERNING WHETHER, PURSUANT TO THE TEACHING OF ABNEY V. UNITED STATES, 431 U.S. 651 (1971), AN EVIDENTIARY HEARING MUST BE HELD UPON A DEFENDANT'S MOTION TO DISMISS AN INDICTMENT ON GROUNDS OF DOUBLE JEOPARDY.

In effectuating the Fifth Amendment's protection against being "twice put in jeopardy of life or limb" for the same offense, this Court has held that pretrial orders denying claims of double jeopardy are immediately appealable as final orders. Abney v. United States, 431 U.S. 651, 662 (1977). In Abney, this

Court explained that the amendment's protections against the risk of conviction "would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken." Id. Further, this Court stated:

> [I]f a criminal is to avoid exposure to double jeopardy and thereby enjoy the full protection of the Clause, his double jeopardy challenge to the indictment must be reviewable before that subsequent exposure occurs.

Id. (Emphasis in original). Thus, this Court found that the Double Jeopardy Clause of the Fifth Amendment was of such fundamental importance that an immediate appeal was required when double jeopardy protections were in any sense threatened.

The right to an interlocutory appeal means little, however, without procedures established to effectuate a meaningful appeal. Therefore, the issue that petitioners now raise, whether a prima facie showing of a double jeopardy claim must

be made before a defendant is entitled to an evidentiary hearing or whether a defendant is entitled to an evidentiary hearing to make his or her prima facie showing, is of critical importance. Its resolution lies at the heart of the Abney decision. The answer to this question determines whether a defendant will be guaranteed an appeal merely in form or an appeal in substance.

Lower courts have grappled with the problem of fashioning procedures affording full Fifth Amendment protection by facilitating appeals from pretrial orders denying claims of double jeopardy. In one of the first cases following this Court's ruling in Abney in which a pretrial double jeopardy challenge was made, the Court of Appeals for the Third Circuit construed Abney to find that certain procedural rules were necessary to effect a double jeopardy

challenge and to present an appealable double jeopardy claim. United States v. Inmon, 568 F. 2d 326 (3rd Cir. 1977). In Inmon, the court explained:

> As necessary consequences, the Abney-DiSilvio rule requires (1) that there must be a pre-trial proceeding in which an appropriate record may be made to test a double jeopardy claim; (2) that there must be rules about going forward with proof, burden of persuasion, and weight of the evidence; and (3) that the procedure must take account of other constitutional rights, such as the privilege against self-incrimination.

Id., at 329 (Emphasis added). The court found that one of the procedures critical to a challenge to an indictment on double jeopardy grounds was a pretrial proceeding at which evidence could be presented to resolve factual disputes and at which an adequate record could be developed for appellate review.

Subsequent to the Inmon decision, the Court of Appeals for the Fifth Circuit

was similarly confronted with an appeal of a district court order denying a motion to dismiss on double jeopardy grounds. United States v. Stricklin, 591 F. 2d 1112 (5th Cir. 1979). The Fifth Circuit also noted the need "to establish procedural rules for an Abney pretrial double jeopardy hearing, so that requirements such as going forward with proof, burden of persuasion, and weight of the evidence are equitably assigned to and understood by the parties." Id., at 1117. To this end, the court adopted the procedural rules, including the requirement of a pretrial evidentiary proceeding, established by the Court of Appeals for the Third Circuit in Inmon. Accord, United States v. Jabara, 644 F. 2d 574 (6th Cir. 1981).

In Inmon, Stricklin, and Jabara, the courts made it clear that under Abney, an evidentiary hearing was absolutely

essential to a district court's determination of a double jeopardy challenge--so that an adequate record would exist for the purpose of appellate review. In evaluating proper evidentiary standards to be used in developing a record, the Third, Fifth and Sixth Circuits acknowledged that basic practical considerations could not be ignored. The fact that the government had superior access to proof and controlled the particularity with which the indictments were drafted was key in defining the evidentiary procedures and standards to be employed. Stricklin, 591 F. 2d at 1118; Inmon, 568 F. 2d at 332, Jabara, 644 F. 2d at 576. Accordingly, the courts determined that the defendant should be afforded the opportunity to establish factual substantiation of his or her double jeopardy claim in an evidentiary hearing.

In clear conflict with the procedure established in Stricklin, Inmon and Jabara, and with the teaching of Abney itself, the court of appeals below aligned itself with the rule of the First Circuit and Ninth Circuit, as stated in United States v. Booth, 673 F. 2d 27 (1st Cir.), cert. denied, 102 S.Ct. 2245 (1982) and United States v. Bendis, 681 F. 2d 561 (9th Cir. 1982) and refused the petitioners an opportunity to an evidentiary hearing to present their double jeopardy claim. Although purporting to follow Stricklin, the court of appeals below found that petitioners were obligated to present a "prima facie nonfrivolous double jeopardy claim" before they were entitled to an evidentiary hearing. In addition, the court found that the denial of an opportunity to an evidentiary hearing was not erroneous because petitioners had failed "to suggest...anything that

might have been accomplished by holding such a hearing." 679 F. 2d at 844, App. at A17. In making such determination, the court failed to recognize the danger of forcing the defendants to "run the gauntlet" that this Court cautioned against in Abney.

As pointed out by Judge Hatchett in his dissent, the majority opinion ignores the rationale behind the procedural rules announced in Inmon and adopted by Stricklin and Jabara. It is at the pretrial evidentiary hearing where petitioners must establish that they possess a nonfrivolous prima facie claim, not prior thereto. Inmon-Stricklin-Jabara never established as a prerequisite to an evidentiary hearing that a defendant would be required to present in his motion papers all of the evidence that proved or tended to prove the double jeopardy claim. To the contrary, the Fifth Circuit in Stricklin

noted that a defendant "might find it necessary to offer his own testimony at the pretrial hearing." Id., at 1118. Quite clearly, the Stricklin-Inmon-Jabara courts recognized that because of the government's control of the facts, a defendant must have a full opportunity to present evidence via witnesses by direct or cross-examination, and to argue inferences and conclusions to be drawn from that evidence, prior to the district court's determination of whether a prima facie nonfrivolous double jeopardy claim had been shown so as to shift the burden of persuasion to the government. It is with this well-reasoned procedure that the opinion of the court below is in conflict.

The rule adopted by the court below as well as the courts in Booth and Bendis seriously erodes the Fifth Amendment protections which Abney was designed to secure.

The requirement of establishing a prima facie showing of double jeopardy before a defendant is granted an evidentiary hearing erects an insurmountable barrier to the presentation of a double jeopardy challenge. The defendant is forced to establish the grounds of his or her claim without access to the very evidence which is needed to make such a showing--the testimony of the government witnesses who conducted the investigation and who fashioned the indictments.

Moreover, the rule presents a serious contradiction with the intent and spirit of Abney by denying the defendant meaningful appellate review. A reviewing court will be faced with a sketchy and incomplete record on which to determine whether a defendant's Fifth Amendment rights have been threatened. If a court of appeals then determines that no opinion can be rendered on the record and an evidentiary hearing is necessary, the case

will have to be remanded. Once the hearing is held and the district court once again rules on the double jeopardy challenge, the claim may very well wend its way back to the appellate court for review. Such a waste of scarce judicial resources cannot be justified.

In short, the rule followed by the court below and the Court of Appeals for the First and Ninth Circuits emasculates Abney by forcing a defendant to appeal on a record of mere accusation and conjecture. Not only is the defendant, under this rule, placed in a position in which it is impossible to demonstrate his double jeopardy claim, but also the reviewing court is forced into the undesirable position of evaluating a claim of constitutional violation on an undeveloped, incomplete record. Such a procedure removes the protections to the defendant against being "forced to 'run the gauntlet'" established under Abney and impairs the system of appellate review

itself. Indeed, this was the very result sought to be avoided by the courts in Stricklin, Inmon and Jabara.

## CONCLUSION

For these reasons, petitioners come before this Court seeking review of the decision of the Court of Appeals for the Eleventh Circuit and request this Court to give guidance and instruction on the proper procedure for effectuating the immediate right of appeal of double jeopardy challenges as conferred by this Court's opinion in Abney v. United States, supra. Just as a defendant's rights against double jeopardy would be seriously undermined if an immediate appeal of the issue could not be taken, those same rights are similarly undermined when a defendant is not permitted adequate opportunity to present evidentiary support to the trial court for his

double jeopardy challenge and further forced to appeal without benefit of a complete record. Accordingly, petitioners respectfully request that this Court grant their petition for a writ of certiorari.

Respectfully submitted,

BERNARD A. BERKMAN
GEORGE W. PALDA
BERKMAN, GORDON, MURRAY
and PALDA
2121 Illuminating Building
55 Public Square
Cleveland, Ohio 44113
(216) 781-5245

Attorneys for Petitioners

Of Counsel:

Lorraine R. Baumgardner